Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	GN Docket No. 10-127
Framework for Broadband Internet Service	)	

To: Wireline Competition Bureau

COMMENTS OF THE USA COALITION

The Universal Service for America Coalition ("USA Coalition" or "Coalition"), by its attorneys, hereby submits these comments in the above-captioned proceeding to address key issues raised by the Notice of Inquiry released by the Federal Communications Commission ("FCC") on June 17, 2010 ("*Notice*").[1] In the *Notice*, the FCC asks for comment on its authority regarding the reform of universal service as proposed in the National Broadband Plan ("NBP").[2]

The USA Coalition respectfully submits that reclassification of services alone would not provide the FCC with sufficient authority to adopt the universal service recommendations of the NBP. Many of the universal service recommendations in the NBP, which does not reflect the requirements of the Communications Act of 1934, as amended, (the "Act"), are fundamentally inconsistent with the Act in ways that reclassification of broadband services could not cure. Since Congress has not authorized the FCC to implement the NBP, legislative reform would be necessary to provide the FCC with the authority to implement many of the NBP's universal service recommendations.

Regardless of whether the FCC ultimately decides to reclassify services, the FCC could achieve its goal of supporting broadband under its existing authority by supporting broadband

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1 *In the Matter of Framework for Broadband Internet Service*, GN Docket No. 10-127, FCC 10-114, Notice of Inquiry (rel. June 17, 2010) ("*Third Way NOI*").

2 *Id.*, ¶¶ 32–38. The FCC also seeks comment on the legal and practical consequences of classifying broadband Internet services as telecommunications services, as well as on the effective date the Commission should adopt for a classification decision. *Id.*, ¶¶ 63–66, 100.

services ***in addition*** to traditional Title II telecommunications services.[3] This approach would be consistent with the Act's mandate that universal service be used to support telecommunications services which enable advanced ***telecommunications and information services*** that have been subscribed to by a substantial majority of residential customers. Therefore, the USA Coalition urges the Commission (1) to permit eligible telecommunications carriers ("ETCs") to use universal service support for both the current list of supported services and broadband services, and (2) to provide all reform measures with a solid legal foundation based upon the Act as it stands today so that the agency will not inadvertently introduce unnecessary uncertainty into the telecommunications marketplace during these times of economic uncertainty.

I. RECLASSIFICATION OF SERVICES ALONE WOULD NOT PROVIDE THE FCC WITH SUFFICIENT AUTHORITY TO ADOPT THE NBP'S UNIVERSAL SERVICE REFORM RECOMMENDATIONS

In the *Notice*, the FCC asks if it can reform its universal service program to support broadband Internet service by asserting direct authority under section 254, combined with ancillary authority under Title I.[4] The NBP recommends that the FCC eliminate all support for Title II telecommunications services (*i.e.*, currently supported voice services) in order to support only Title I information services (*i.e.*, broadband services).[5] However, since the Act provides that "[u]niversal service is an evolving level of ***telecommunications services***," the FCC would, absent reclassification of broadband services as telecommunications services, have to rely upon its Title I ancillary jurisdiction in order to support broadband services with universal service

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3 *See, e.g.,* Comments of the USA Coalition, WC Docket No. 05-337, CC Docket No. 96-45 (filed Jan. 28, 2010); Comments of the USA Coalition, WC Docket No. 05-337, CC Docket No. 96-45 (filed May 8, 2010); Comments of the USA Coalition, GN Docket Nos. 09-47, 09-51, 09-137 (filed Dec. 7, 2009).

4 *Third Way NOI*, ¶¶ 31–32.

5 *See* Federal Communications Commission, *Connecting America: The National Broadband Plan*, Chap. 8 "Availability" (rel. Mar. 16, 2010) ("*National Broadband Plan*").

funding.[6] However, if no universal service support whatsoever is necessary for any Title II telecommunications services, then the FCC cannot claim that support for information services is necessary to achieve any statutorily mandated responsibility.[7] Accordingly, if the FCC eliminates all support for telecommunications services, the FCC cannot rely on Title I ancillary jurisdiction to support only information services. For this reason, the FCC has proposed to reclassify broadband services as telecommunications services.

The USA Coalition respectfully submits that reclassification of services alone would not provide the FCC with sufficient authority to adopt the USF recommendations of the NBP, as the NBP does not reflect the universal service requirements of the Act. The FCC, like all administrative agencies, is a "creature of statute" and draws its authority from Congress.[8] The authorizing statute for the FCC is the Act.[9] Accordingly, the FCC must comply with all provisions of the Act, including those the FCC believes are flawed, because the FCC has no authority whatsoever to correct flaws in the Act. As the Supreme Court has explained, when a statute fails to confer authority necessary for an agency to provide "safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [FCC] or the

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6 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1962) (explaining that "[a]ncillary authority" refers to the Commission's discretion under Title I of the Act to adopt measures that are "reasonably ancillary to the effective performance of the Commission's various responsibilities …").

7 As the United States Court of Appeals for the District of Columbia Circuit recently emphasized in *Comcast Corporation v. FCC*, No. 08-1291 (D.C. Cir. Apr. 6, 2010) ("*Comcast*"), the FCC can exercise its Title I ancillary authority only ***as necessary*** to achieve a specific statutorily mandated responsibility. If universal service funding were unnecessary for telecommunications services, which the FCC would have to conclude in order to eliminate funding for such service in light of the Act's requirement that universal service funding be sufficient, the agency could not credibly maintain that funding of broadband services is necessary to further the universal availability of telecommunications services at affordable rates. *See* 47 U.S.C. 254(c).

8 The Constitution vests "[a]ll legislative Powers" in the Congress. U.S. CONST. art. I § 1. The FCC literally has no power to act -- unless and until Congress confers power upon it. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

9 47 U.S.C. §§ 151, *et seq.*

courts, to address."[10] Accordingly, the FCC's reform efforts must start and end with the specific requirements of the Act, even if the agency believes that the Act is flawed with respect to broadband services.

The FCC wrote the NBP as a result of a Congressional mandate in the American Recovery and Reinvestment Act of 2009 ("ARRA").[11] The mandate was not based upon the Act, and thus the NBP that the FCC developed in response to the ARRA reflects neither the requirements of the Act generally nor the universal service provisions of the Act in particular. Specifically, the ARRA's mandate provides in relevant part as follows:

> The national broadband plan required by this section shall seek to ensure that ***all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal***. The plan shall also include—
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> (A) an analysis of the ***most effective and efficient mechanisms for ensuring broadband access by all people of the United States***;
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> (B) ***a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;***
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> (C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and
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> (D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.[12]

In short, the ARRA required the FCC to write a report for Congress regarding broadband services, all of which were classified as information services under the Act when Congress adopted the ARRA. However, the ARRA did not amend the Act or authorize the FCC to

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10 *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

11 American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(1)-(2) (2009).

12 *Id.* § 6001(k)(2) (emphasis added).

implement any of the recommendations set forth in the report. As such, the FCC's actions remain governed solely by the Act.

The USF provisions of the Act establish a very different mandate for the Commission than the goal of the NBP. In the Act, Congress directed the Commission and states to take the steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low-income consumers, eligible schools and libraries, and rural health care providers. Specifically, Congress directed the Commission and the states to devise methods to ensure that "[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas . . . have access to telecommunications and information services ... at rates that are reasonably comparable to rates charged for similar services in urban areas." Under the Act, "[u]niversal service is an evolving level of ***telecommunications services*** that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information services."[13] The Act further provides that:

> The [Federal-State Joint Board on Universal Service ("Joint Board")] in recommending, and the Commission in establishing, the definition of services that are supported by Federal universal service support mechanisms shall consider the extent to which such ***telecommunications services*** --
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> (A) are essential to education, public health, or public safety;
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> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
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> (C) are being deployed in public ***telecommunications networks*** by ***telecommunications carriers***; and
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> (D) are consistent with the public interest, convenience and necessity.[14]

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13 47 U.S.C. §254(c) (emphasis added).

14 *Id.* (emphasis added).

As such, unlike the NBP, which focuses solely on broadband information services, the Act mandates that universal service be used to support "an evolving level of ***telecommunications services***" which enable ***advanced telecommunications and information services that have been subscribed to by a substantial majority of residential customers***.[15]

Regardless of the need to support access to broadband and other advanced information services, Congress does not intend for the FCC to ignore the concurrent need to support access to telecommunications services, and thus the Act does not permit the FCC to do so.[16] Similarly, the Act requires the FCC to support all telecommunications services that meet the criteria set forth in the Act to the extent necessary to achieve the goals of the Act. Consequently, the FCC cannot focus solely on broadband services to the exclusion of every other service, even if the agency ultimately reclassifies broadband services as telecommunications services.

Moreover, unlike the ARRA, the Act also envisions -- and requires -- the FCC to work with the Joint Board not only to create, but also to maintain, the list of services supported by universal service. Although the Commission recommended a radical change to the scope of supported services in the NBP, the Act requires the issue of supported services to be referred to the Joint Board for consideration and recommendation, which the FCC must consider before adopting any changes to the list of supported services.[17] As such, the FCC cannot adopt radical

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15 *Id.* (emphasis added).

16 The Act specifically prohibits focusing on information services to the exclusion of telecommunications services: "Access to advanced telecommunications ***and*** information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2) (emphasis added). By focusing universal service support solely on information services such as broadband, the FCC is ignoring its mandate to promote access to telecommunications services. Indeed, by definition, "universal service is an evolving level of ***telecommunications services***." 47 U.S.C. § 254(c)(1) (emphasis added).

17 *See* 47 U.S.C. §§ 254(a) ("The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after the date of enactment of the Telecommunications Act of 1996. . . . The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board . . . . Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after

changes to the scope of supported services without consulting the Joint Board merely because the changes were recommended in the NBP.

With respect to universal service rules and policies, the Act further requires the FCC to base its policies on a series of principles, including:

> (1) QUALITY AND RATES. -- Quality services should be available at just, reasonable and affordable rates.
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> (2) ACCESS TO ADVANCED SERVICES. -- Access to advanced ***telecommunications and information services*** should be provided in all regions of the Nation.
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> (3) ACCESS IN RURAL AND HIGH COST AREAS. -- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to ***telecommunications and information services, including interexchange services and advanced telecommunications and information services***, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
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> (5) SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS. -- There should be ***specific, predictable and sufficient*** Federal and State mechanisms ***to preserve and advance*** universal service.[18]

"Alongside the universal service mandate is the directive that local telephone markets be opened to competition. The FCC must see to it that both universal service and local competition are realized; one cannot be sacrificed to the other."[19] Accordingly, the universal service program

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receiving such recommendations."). Indeed, nearly every provision in section 254 envisions, and requires, that universal service policies be created jointly by the Commission and the Joint Board. 47 U.S.C. §§ 254(b), 254(b)(7), 254(c)(1), 254(c)(2).

18 47 U.S.C. § 254(b) (emphasis added); *see also* 47 C.F.R. § 54.101(a)(7) ("Access to interexchange service. 'Access to interexchange service' is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, or the functional equivalent of these network elements in the case of a wireless carrier, necessary to access an interexchange carrier's network.").

19 *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000) ("*Alenco*") (citations omitted), *citing* 47 U.S.C. §§ 251–253; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L. Ed. 2d 834 (1999); *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406, 412 (5th Cir. 1999) ("*TOPUC*"); *see also id.* at 614 (noting the "twin Congressional mandates articulated in the Telecommunications Act of 1996 (the "Act") of providing universal telecommunications service in the United States and injecting competition into the market for local telephone service.").

> must treat all market participants equally -- for example, subsidies must be portable -- so that the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers. Again, ***this principle is made necessary*** not only by the economic realities of competitive markets but also ***by statute***.[20]

The FCC, therefore, adopted competitive neutrality as a core universal service principle that is necessary for promoting the twin goals of universal service and competition under the Act.[21] As such, the FCC's USF mandate extends far beyond the NBP's goal of ensuring that all people in the United States have access to affordable broadband services (*i.e.,* advanced information services).

Under the Act, the FCC must, among other things, implement ***specific, predictable, and sufficient*** universal service mechanisms that preserve and advance universal service such that consumers in all regions of the Nation have access to ***telecommunications and information services, including interexchange services and advanced telecommunications and information services***, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas. Accordingly, rather than merely adopting a definition for broadband and ensuring that all people have access to such broadband services, the Act requires the FCC to engage in a

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20 *Alenco*, 201 F.3d at 616 (emphasis added).

21 *See* Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, 8790 (1997) ("*Universal Service First Report and Order*") ("We adopt this principle [of competitive neutrality] and the principles enumerated by Congress in section 254(b) to preserve and advance universal service while promoting the pro-competitive goals of the 1996 Act."); *id.* at 8801-02 ("[A]n explicit recognition of competitive neutrality in the collection and distribution of funds and determination of eligibility in universal service support mechanisms is consistent with congressional intent and ***necessary*** to promote 'a pro-competitive, de-regulatory national policy framework.'" (footnote omitted) (emphasis added)); *id.* at 8801 (ruling that the universal service mechanisms and rules should "neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology or another."); *id.* at 8787 ("Over time, it will be necessary to adjust the universal service support system to respond to competitive pressures and state decisions so that the support mechanisms are sustainable, efficient, explicit, ***and promote competitive entry***.") (emphasis added); *id.* at 8802 (concluding that, under a competitively neutral regime, "[regulatory] disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers").

comparative exercise to ensure that all people have access to reasonably comparable telecommunications and information services at reasonably comparable rates.

The implementation of recommendations based on the tightly focused goals of the NBP without consideration of the broad-ranging requirements of the Act would, in addition to being unlawful, harm consumers. For example, the NBP focuses solely on broadband deployment, and would limit support solely to one provider in each geographic area that currently lacks access to broadband speeds that equal or exceed 4 Mbps download and 1 Mbps upload while simultaneously withdrawing all support for any other providers serving the area with slower download and upload speeds.[22] The double whammy of withdrawing support while subsidizing a single competitor that offers faster speeds could very well result in higher prices and fewer choices for consumers living in the area, even though the services they currently enjoy serve their needs and may not be appreciably slower than those offered by the subsidized broadband provider. Even if the subsidized provider offers much greater speeds, consumers in the area may not want or need the faster services enough to justify the higher prices they must pay for such services. These problems would only become exacerbated over time to the extent unsubsidized providers begin to withdraw from the market and the subsidized provider faces fewer competitive forces. The chances for this type of outcome are exactly why the more comprehensive approach mandated by the Act protects consumers far better than that of the narrow focus of the NBP.

In short, although the ARRA required the FCC to identify mechanisms and set forth strategies for ensuring broadband access by all people of the United States, the ARRA did not authorize the FCC to adopt any of the mechanisms or implement any of the strategies set forth in the NBP. As such, the FCC's efforts to ensure affordable broadband access, including through

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22 *National Broadband Plan*, Chapter 8.

USF reform, remain governed solely by the Act. In light of the significant differences between the requirements for the NBP and the universal service requirements of the Act, the FCC can implement the universal service reform recommendations of the NBP only to the extent they are fully consistent with the Act.

Because the NBP was not based upon the Act, and because the FCC is limited in its recommendations solely to measures that could be adopted under the current Act, legislative reform would be necessary to achieve some of the recommendations of the NBP, which are fundamentally inconsistent with the requirements of the current Act for the reasons explained above. Accordingly, even if the FCC ultimately reclassifies broadband services as telecommunications services, any universal service reform must be fully consistent with the requirements of the Act as it stands when the agency adopts the reform measures.

CONCLUSION

For the reasons explained above, the USA Coalition respectfully submits that reclassification of services alone would not provide the FCC with sufficient authority to adopt the universal service recommendations of the NBP.

Respectfully submitted,

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